U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 16 2015 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. We will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an elementary special education (SPED) teacher for in Maryland. The petitioner began teaching at in December 2007. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief.

I. Law

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the

Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dep't of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The term "prospective" is included here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

II. Analysis

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on August 22, 2013. An accompanying introductory statement indicated that the petitioner's "work . . . as an elementary

school SPED educator clearly evinces substantial intrinsic merit." This point is not in dispute. Other assertions in the introductory statement, however, are more problematic:

> As demonstrated through the . . . enclosed documentation, [the petitioner] plays a crucial role in the future of the improvement of United States education and the attainment of our nation's goals. . . .
>
> The substantial impact that [the petitioner] already has had on her students, their families, her community, and the education field is already evident [from] her past achievements.

The evidence submitted with the petition was local in nature. Specifically, the petitioner submitted documentation of professional development activities, evaluations and observations, and letters from educators who have worked closely with the petitioner, mostly as administrators and teachers at schools where she has worked. The petitioner did not explain how these materials show that she "plays a crucial role in the future of the improvement of United States education" or demonstrate "substantial impact . . . on . . . the education field." The letters submitted with the petition described and praised the petitioner's local work within but did not indicate that the petitioner's efforts have had a wider impact.

The director issued a request for evidence (RFE) on November 26, 2013. In that notice, the director listed and discussed the exhibits submitted in support of the petition, and found them "deficient to establish that the petitioner's work as an elementary special education teacher has had an impact on the field as a whole and that her teaching techniques are [being] used by other schools other than her employer's organization."

The petitioner's response included background materials regarding science, technology, engineering, and mathematics (STEM) education. The petitioner's initial submission did not indicate any emphasis on STEM subjects in her classes. Her certification areas are "Early Childhood Education Pre-K-3" and "Generic Special Education Infant-3." The petitioner did not explain or establish the relevance of these newly submitted background materials to her field of early childhood special education. Furthermore, these materials concern the intrinsic merit of education; they do not establish that the work of any one teacher produces benefits that are national in scope. The collective benefit from the work of all teachers speaks to intrinsic merit, which is not in dispute.

The response statement includes the following passage:

> The reasonable standard in determining whether the proposed employment is national in scope must not purely be geographical in nature but intellectual consideration as well such as directed to recapture the nation's economic dominance by future American populace. . . .

> Syllogistically, hiring 'Highly Qualified Teachers' would produce more graduates than dropouts. By producing graduates and eliminating dropouts, State and Federal Governments would be empowered by mature, intelligent and responsible citizenry.

The petitioner's RFE response statement detailed federal education initiatives and Maryland's statewide efforts to meet federal benchmarks, and indicated that the petitioner "plays a primary role in accomplishing the law's goal of closing the achievement gap" and "is an effective teacher in raising student achievement in STEM." The petitioner did not submit evidence to establish her role in "closing the achievement gap" or "raising student achievement in STEM," or to show that the hiring of one "Highly Qualified Teacher" increases graduation rates. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The RFE response statement offered generalized arguments regarding the importance of training workers in STEM fields and closing the "achievement gap" that exists along certain ethnic and economic lines. The evidence specific to the petitioner, however, did not indicate that her work has addressed or will address these issues.

The RFE response statement claimed that the No Child Left Behind Act of 2001 (NCLBA), Pub. L. 107-110, 115 Stat. 1425 (Jan. 8, 2002), "trumps the Labor Certificat[ion] since job opportunities for U.S. workers are guaranteed once No Child Left Behind Act of 2001 is faithfully executed." The petitioner did not identify any passage of the NCLBA that addresses immigration or guarantees "job opportunities for U.S. workers."

The RFE response statement also claimed that the labor certification process would pose a "dilemma" because the petitioner's qualifications exceed the minimum requirements for the position, and "the employer is required by No Child Left Behind (NCLB) Law . . . to employ highly qualified teachers." The petitioner did not show that these two considerations are incompatible. Section 9101(23) of the NCLBA defines the term "highly qualified teacher" as one who:

- has obtained full State certification as a teacher or passed the State teacher licensing examination, and holds a license to teach in such State;
- holds at least a bachelor's degree; and
- demonstrates competence in the academic subjects he or she teaches.

The petitioner did not explain how the above requirements are incompatible with the existing labor certification process, and she submitted no evidence that the statutory job offer requirement has resulted in the widespread employment of teachers who are less than "highly qualified" or has impeded the employment of such teachers from abroad. The minimum degree requirement (*i.e.*, a bachelor's degree) is the same for labor certification as it is for a highly qualified teacher, and the petitioner did not show that the NCLBA distinguishes between teachers with bachelor's degrees and teachers with master's degrees.

The director denied the petition on July 7, 2014. The director discussed the evidence that the petitioner submitted with the initial filing, and in response to the RFE. The director concluded that the petitioner had established the substantial intrinsic merit of her occupation, but had not shown that the benefit from her work, individually, would be national in scope. The director also found that the petitioner had not established a history of impact on the field that would demonstrate that she has benefited the national interest to a greater extent than a qualified U.S. worker would do in the same position. The director acknowledged the "cumulative national effect" of "staff[ing] every school with highly qualified teachers," but noted that the approval of the petition would not have that effect. "Rather, the approval of this petition would fill one position at one school."

On appeal, the petitioner submits a brief, repeating the argument that the NCLBA essentially established a blanket waiver for "highly qualified teachers." The brief contends that, by enacting the NCLBA, "**the United States Congress has spelled out the national interest with respect to public elementary and secondary school education**" (emphasis in original):

> [T]he NCLB Act and the Obama Education Programs, taken collectively, provide the underlying context for the adjudication of a national interest waiver application made in connection with an E21 visa petition for employment as a Highly Qualified Teacher in the public school sector.
>
> **The obscurity in the law that *NYSDOT* sought to address has been clarified**, at least with respect to questions about the national educational interest. Thus, an automatic application of NYSDOT's exacting standards in a national interest waiver connected with a job in a public school district, without considering the wide-ranging impact of the NCLB Act, would be inapposite given the factual circumstances availing in NYSDOT and the post-NYSDOT enactment of the NCLB Act. More importantly, a straight-jacket [*sic*] application of NYSDOT constricts, instead of promoting, the national educational interests. In effect, therefore, the United States Congress, with the enactment of the **NCLB Act, has preempted the USCIS** with respect to the parameters that should guide its determination whether a job offer requirement based on the national educational interests is warranted. Otherwise stated, the requirement of a job offer or labor certificate for the occupation of Special Education Teacher in a public school district should be waived if it is established that the alien will substantially benefit prospectively the national educational interests of the United States, as these interests are enunciated in the NCLB Act and the Obama Education Programs. . . .
>
> **The mandate for 'flexibility in the adjudication of NIW cases' . . . must be construed liberally rather than strictly compared to the New York State Department of Transportation case. USCIS is now required by United States Congress through the No Child Left Behind Act of 2001 . . . to make it "flexible["] and thus possible rather than impossible in favor of the 'Best Interest of the School Children,' by granting waivers to 'Highly Qualified**

Teachers' who have already been serving the cause instead of requiring labor certification which may only reveal uncommitted U.S. workers with minimum education qualification.

(Emphasis in original.) In the passage quoted above, the petitioner's appellate brief contended that a waiver is in order "if it is established that the alien will substantially benefit prospectively the national educational interests of the United States." The plain text of section 203(b)(2)(A) of the Act, however, states: "Visas shall be made available . . . to qualified immigrants who . . . will substantially benefit prospectively the national . . . educational interests, or welfare of the United States, and whose services . . . are sought by an employer in the United States." In this way, Congress specified that substantial prospective benefit to the educational interests of the United States is not sufficient for the waiver; an intending immigrant who offers such benefit must still be "sought by an employer in the United States." The NCLBA did not establish a separate or lower standard for teachers. The brief contains the claim that "USCIS is now required . . . [by] the No Child Left Behind Act . . . [to grant] waivers to 'Highly Qualified Teachers,'" but the brief does not identify any provision of the NCLBA setting forth that requirement. The petitioner has submitted numerous claims regarding the immigration consequences of the NCLBA, but, lacking support, those assertions have no weight in this proceeding. *See Matter of Soffici*, 22 I&N Dec. at 165.

The appellate brief contains several variations on the claim that Congress, by passing the NCLBA, specifically intended to overrule *NYSDOT* and thereby create a blanket national interest waiver for "highly qualified teachers." Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). Here, the petitioner has not established that Congress intended to exempt teachers from the job offer requirement, either through section 203(b)(2) of the Act, the NCLBA, or any other federal legislation. Congress's only direct statement on the matter has been to apply, not waive, the requirement, by stating in section 203(b)(2)(A) of the Act that the job offer requirement applies to members of the professions. Section 101(a)(32) of the Act indicates that school teaching is a profession.

The NCLBA did not amend section 203(b)(2) of the Act or otherwise mention the national interest waiver or other immigration provisions. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act, to create special waiver provisions for certain physicians. Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*. The petitioner has not established that the NCLBA indirectly implies a similar legislative change. Thus, the principal foundation of the appellate brief is without support and, thus, without weight.

III. Conclusion

The petitioner has not established a past record of achievement at a level that would justify a waiver of the job offer requirement. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that her influence be national in scope. *NYSDOT*, 22 I&N Dec. at 217, n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole").

As is clear from the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

We will dismiss the appeal for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.